100TH CONGRESS
1st Session

SENATE

REPORT
100–124

CONTRACT DISPUTES ACT AMENDMENTS OF 1987

JULY 24 (legislative day, JUNE 23), 1987.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 345]

The Committee on Governmental Affairs, to which was referred the bill (S. 345) to amend the Contract Disputes Act of 1978 to require that a competitive examination process be used for the selection of members of boards of contract appeals of Federal Government agencies; and to provide that the members of such boards shall be treated in the same manner as administrative law judges of the Federal Government for certain administrative purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

		Page
I.	Purpose	1
II.	Background and Need for Legislation	2
III.	Provisions of S. 345	4
IV.	Support for S. 345	5
V.	Conclusion	6
VI.	Section-by-Section Analysis	6
VII.	Estimated Cost of Legislation	6
VIII.	Evaluation of Regulatory Impact	7
IX.	Vote in Committee	7
X.	Changes in Existing Law	7

I. PURPOSE

The purpose of S. 345, the Contract Disputes Act Amendments of 1987, is to enhance the independence of the contract disputes process by providing selection and removal protections for Administrative Judges who serve on agency Boards of Contract Appeals (BCAs) in order to insulate them from agency control.

91-010

S403-5

II. Background and Need for Legislation

In 1978, Congress enacted the Contract Disputes Act (Public Law 95-563; 41 U.S.C. 601 et seq.), which governs the submission of contract claims to the government and the resolution of disputes arising from those claims. While the statute has generally operated effectively, government officials and government contractors have raised concerns about the independence of the contract disputes process. S. 345, the Contract Disputes Act Amendments of 1987, introduced by Senators Cohen and Levin, is designed to address this concern.

The objective of this bill is to eliminate the perception that the contract disputes process is not sufficiently insulated from agency control. To this end, S. 345 would provide Board of Contract Appeals (BCA) Judges with the same selection and removal protections that the Administrative Procedure Act affords Administrative Law Judges. S. 345 has been unanimously approved by the Subcommittee on Oversight of Government Management, the Committee on Governmental Affairs, and the full Senate.

Congress enacted the Contract Disputes Act (CDA) of 1978 to govern the submission of contract claims to the government and the resolution of disputes arising from those claims. Under the CDA, agency Boards of Contract Appeals are authorized to serve as independent, adjudicative forums for resolving contract disputes.

The CDA provides that BCA Judges shall be "selected and appointed to serve in the same manner" as Administrative Law Judges (ALJs) appointed pursuant to the Administrative Procedure Act. Implementation of the CDA, however, is inconsistent with this mandate.

Currently, BCA Judges are selected by the individuals agencies on whose boards they serve and—because the CDA is not specific on removal protections—may be dismissed without any independent review.

ALJs, in contrast, are selected from a government-wide register established by the Office of Personnel Management (OPM) and may only be removed for good cause after a hearing before the Merit Systems Protection Board.

This inconsistency, according to the General Accounting Office, contributes to the perception that BCA Judges are not as independent as ALJs. In a September 1985 report (NSIAD-85-102), the GAO found that:

> Because no independent body, like the OPM, issues government-wide regulations for the selection and appointment of board members, and because the [Contract Disputes Act] is unclear concerning any removal protections, members of boards of contract appeals are not as insulated as they could be from agency control.

The shortcomings of the selection and appointment procedures for BCA Judges have long been a concern of the Governmental Affairs Committee. According to the legislative history underlying the CDA, the ALJ system was to be used as a model for developing and implementing a system to ensure the independence of the BCA Judges. The CDA, however, fails to establish an ALJ-like system

because it does not contain an explicit requirement that a separate agency—such as OPM—select, administer, and maintain a register of persons qualified for appointment to the BCAs.

At this time, the interagency registers, originally established and currently maintained by the Department of Defense and the General Services Administration, continue to be used by the agencies as the primary sources for filling their vacancies. Agencies select candidates for their own boards under procedures that need only comply with the eligibility requirements of the CDA. The control that the agencies exert over the selection process raises concerns about the independence of the Judges who are charged with ruling on disputes between the agencies and their contractors.

Arbitrary removal is also a concern, since the threat alone could potentially compromise the independence of BCA Judges. Arbitrary removal is by no means common practice, but a GAO report indicates that it has happened in the past.

Glenn Robert Lawrence, Chairman on the Administrative Judiciary Committee of the Federal Bar Association, in an April 17, 1987, letter wrote:

> Codes of judicial ethics have, since ancient times, required that the adjudicator be a disinterested person not under any obligation to the parties to a controversy. In the present set-up, the BCA judge is not only employed by the agency who is a party to the suit but he is a "schedule A attorney" in a "hiring at will" relationship with his employer. From the public perception this smacks of "self dealing" and suggests almost an improper arrangement on its face. Confidence in the whole process would be substantially enhanced if at the least the BCA judge secures job protection.

To eliminate the perception that BCA Judges are not sufficiently insulated from agency control, the GAO recommended that "the Congress may want to consider amending the Contract Disputes Act of 1978 . . . to give the Office of Personnel Management and the Merit Systems Protection Board roles in [the BCA Judges' selection and removal] processes."

S. 345 incorporates language from Title I of S. 2426, introduced by Senator Cohen and Senator Levin in the 99th Congress, which passed the Senate but received no action in the House.

S. 345, and its predecessors from the 99th Congress,[1] were circulated for comment to the following agencies and organizations: the Office of Federal Procurement Policy, the Office of Personnel Management, the Department of Defense, the General Services Administration, the National Aeronautic and Space Administration, the Armed Services Board of Contract Appeals, the General Services Board of Contract Appeals, the NASA Board of Contract Appeals, the General Accounting Office, the Public Contract Law Section of

[1] In the 99th Congress, Senator Cohen solicited comments from the organizations and agencies below on S. 2223 and S. 2426. Many recommendations were incorporated into S. 2426, which was a revised version of S. 2223. In the 100th Congress, Senator Cohen reintroduced the provisions of Title I of S. 2426 as S. 345.

the American Bar Association, the Federal Bar Association and the BCA Judges Association.

On May 15, 1987, the Oversight Subcommittee reported out S. 345 unanimously. The Governmental Affairs Committee ordered the bill reported on May 19, 1987. The Senate, by voice vote, passed S. 345 without amendment on May 21, 1987.

III. Provisions of S. 345

COMPETITIVE SERVICE

S. 345 provides that BCA Judges, like ALJs, would be placed in the competitive service, subject to the competitive examinations conducted by the Office of Personnel Management.

The Committee intends that individuals selected from the OPM register for appointment as BCA Judges would be career absolute appointments, as are ALJs. This stipulation is necessary because it has long been recognized that probationary or career-conditional appointments are incompatible with the judicial function and with the exercise of decisional independence.

EXAMINATION AND REGISTER

S. 345 requires that the examination for BCA Judges take into consideration the mandate under the Contract Disputes Act for five years public contract law experience, and also that those candidates qualified to serve as BCA Judges should be placed on a register separate from that of ALJs. S. 345 provides that:

> Such competitive examination shall be designed to demonstrate, among other appropriate qualifications, the applicant's public contract law experience. A separate register shall be established and maintained for candidates eligible for appointment to such boards.

DELEGATION OF COMPETITIVE EXAMINATION

Under current law (5 U.S.C. 1004), OPM is authorized to delegate its responsibility for administering competitive examinations to the heads of other agencies. Section 1104(a)(2) of title 5, however, prohibits the delegation of this responsibility in the case of competitive examinations of ALJs.

S. 345 extends this prohibition to the selection of BCA Judges.

REMOVAL AND PERFORMANCE PROTECTIONS

In order to ensure that BCA Judges are truly insulated from agency constrol, S. 345 extends to them the full array of ALJ protections. Perhaps most important of these protections is the removal protection (5 U.S.C. 7521) that provides that a BCA Judge may only be removed for good cause after a hearing before the Merit System Protection Board. Additional protections provided under S. 345 include exemption from performance valuations (5 U.S.C. 4301), guarantee of periodic step increases (5 U.S.C. 5335), and permission for reemployment in certain cases (5 U.S.C. 3323(b)(2)).

GRANDFATHERING INCUMBENTS

S. 345 specifies that members of agency Boards of Contract Appeals serving on the date of enactement shall be considered to have been examined, selected and appointed in accordance with the Contract Disputes Act of 1978, as amended by this legislation.

IV. Support for S. 345

The Oversight Subcommittee received several letters from organizations, expressing support for S. 345. In an April 14, 1987 letter, Harry R. Van Cleve, General Counsel to the General Accounting Office, stated that ". . . we believe the proposed bill addresses the concerns about the independence of Board of Contract Appeals members raised by our report . . ."

Paul Dembling, Chairman of the Public Contract Law Section of the American Bar Association, in a March 20, 1987 letter, wrote:

> Last year, the American Bar Association Section of Public Contract Law supported the provisions of S. 2426 that related to the independence of the members of the Boards of Contract Appeals. Now that those provisions have been reintroduced as S. 345, the Section reiterates its support for these proposals and urges expeditious action on this bill.

The BCA Judges Association (formerly the National Conference of Boards of Contract Appeals Members) believes that S. 345 "strikes the proper balance between the judges' need for decisional independence and management's interest in satisfactory performance." In an April 15, 1987 letter BCA Judges Association President Richard M. Bayus wrote:

> Agencies were given some management prerogatives by the CDA to assure appropriate BCA performance, e.g., the CDA does not preclude agencies from assigning to their BCAs duties not inconsistent with adjudication of contract disputes, and many BCAs perform such duties. Application of the "good cause" standard, which is the criterion generally applied in adverse personnel actions in the federal system, allows an agency to take management action if a judge's conduct or work performance falls below acceptable standards, while precluding such action based only upon a judge's decision on a claim which did not favor the agency.

Glenn Robert Lawrence, Administrative Judiciary Committee Chairman of the Federal Bar Association, wrote that he "most enthusiastically support[s]" S. 345, asserting the following:

> The Board of Contract Appeals judges sometimes deal with suits involving hundreds of millions of dollars. (I've been involved in cases of that magnitude as a government lawyer.) A judge sitting on a case of that sort must have a certainty that his job is not vulnerable to capricious agency action. The administrative law judge has that protection. The BCA does not.

V. Conclusion

Enactment of this legislation would improve the contract disputes system by ensuring the decisional independence of BCA Judges. The Governmental Affairs Committee believes that it is important to note, however, that its scrutiny of the present BCA system should not be interpreted as calling into question the actions of those Judges now serving on the various Boards. Clearly, the decisional history of these boards demonstrates the integrity of the Judges who serve on them. By providing BCA judges with statutory protections, the Committee believes that public confidence in the independence of these adjudicators would be enhanced.

VI. Section-by-Section Analysis

The short title of this bill is the Contract Disputes Act Amendments of 1987.

S. 345 amends the CDA (41 U.S.C. 607(b)(1)) by setting forth statutory protections for the BCA Judges.

This bill clarifies that BCA Judges are in the competitive service, subject to the competitive examination conducted by the Office of Personnel Management. The bill further stipulates that the competitive examination is to be designed to demonstrate the applicant's public contract law experience, as required under the CDA, and that a separate register is to be established and maintained for eligible candidates.

Finally, the bill extends to the BCA Judges a list of protections currently afforded to ALJs. These protections include: prohibition against redelegation of examination responsibility (5 U.S.C. 1104(a)(2)), permission for reemployment in certain cases (5 U.S.C. 3323(b)(2)), exemption from performance evaluations (5 U.S.C. 4301(2)(D)), guarantee of periodic step increases (5 U.S.C. 5335(a)), and removal only for good cause after a hearing before the Merit System Protection Board (5 U.S.C. 7521).

Section 3 of the bill "grandfathers" existing BCA Judges serving on the date of enactment of this bill.

VII. Estimated Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 28, 1987.

Hon. John Glenn,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 345, the Contract Disputes Act of 1987, as ordered reported by the Senate Committee on Governmental Affairs on May 19, 1987. CBO estimates that enactment of this bill would result in no significant costs or savings to the federal government and would not affect the budgets of state or local governments.

The bill would require federal agencies to use a competitive examination process to select judges for agencies' boards of contract appeals (BCA). The bill would also require BCA judges to be treated in the same manner as federal administrative law judges for

certain administrative purposes. Under current law, BCA judges are selected by the agency on whose board they serve and may be removed without appeal. S. 345 would eliminate agency responsibility for maintaing a list of candidates for BCA positions and would transfer this responsibility to the Office of Personnel Management (OPM), which currently maintains such a list for administrative law judges. In addition, BCA judges could be removed only for good cause after a hearing before the Merit Systems Protection Board. These provisions would provide protection for BCA judges to insulate them from agency control.

Based on information from OPM and several other agencies, we expect OPM could perform the additional examination and registration requirements without significant additional costs, because agencies fill only one or two BCA vacancies per year. The federal government would not realize significant savings because executive agencies currently expend little effort to maintain registers of qualified candidates for BCA positions.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES BLUM
(For Edward M. Gramlich, Acting Director).

VIII. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirement of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 345, the Contract Disputes Act Amendment of 1987.

S. 345, as reported, is designed to enhance the independence of the contract dispute process. The Committee does not believe that this legislation will result in any regulatory impact and does not foresee any significant paperwork impact.

IX. VOTE IN COMMITTEE

The Committee, a quorum being present, reported S. 345 by voice vote on May 19, 1987.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no changes are proposed is shown in roman).

TITLE 41. PUBLIC CONTRACTS

* * * * * * *

CHAPTER 9—CONTRACT DISPUTES

* * * * * * *

APPOINTMENT OF MEMBERS; CHAIRMAN; COMPENSATION

• • • • • • •

SEC. 607. (b)(1)(A) Except as provided in paragraph (2), the members of agency boards shall be [selected] *in the competitive service, selected pursuant to the competitive examination process under subchapter 1 of chapter 33 of title 5, United States Code,* and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of Title 5, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. [Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified.] *Such competitive examination shall be designed to demonstrate, among other appropriate qualifications, the applicant's public contract law experience. A separate register shall be established and maintained for candidates eligible for appointment to such boards.*

(B) The chairman and vice chairman of each board shall be designated by the agency head from members so appointed.

(C) The chairman of each agency board shall receive compensation at a rate equal to that paid a GS–18 under the General Schedule contained in section 5332 to Title 5, the vice chairman shall receive compensation at a rate equal to that paid a GS–17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS–16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS–16, GS–17, and GS–18 of such General Schedule under existing law.

(D) For the purposes of sections 1104(a)(2), 3323(b)(2), 4301(2)(D), 5335(a), and 7521 of title 5, United States Code, a member of any agency board appointed under this paragraph shall be treated in the same manner as an administrative law judge.

○